

No. 81480-5

81478-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ENVER MEŠTROVAC

Petitioner,

vs.

FILED
JUL 14 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE
APPEALS,

Respondents.

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION AMICUS CURIAE MEMORANDUM
SUPPORTING REVIEW

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On Behalf of

Washington State Trial Lawyers Association Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of the State of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which now operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress under the civil justice system. More particularly, WSTLA Foundation has an interest in the right of workers' compensation claimants with limited English proficiency (LEP) to interpreter services under Ch. 2.43 RCW, with regard to the processing and adjudication of their claims under the Industrial Insurance Act, Title 51 RCW.

WSTLA Foundation filed an amicus curiae brief in this case before the Court of Appeals, Division I, and appeared at oral argument in that court. See Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation (C.A. #58200-3-I) [WSTLA Fdn. Meštrovac Am. Br.] This Court granted WSTLA Foundation permission to file this amicus curiae memorandum, pursuant to RAP 13.4(h).

II. BACKGROUND

This review arises out of the published opinion of the Court of Appeals in Meštrovac v. Labor & Indus., 142 Wn.App. 693, 176 P.3d 536 (2008), *review pending*.¹ This case involves review of a workers'

¹ Meštrovac is one of three cases decided by Division I on the same day, each of which addresses the rights of LEP claimants under Ch. 2.43 RCW, in a workers'

compensation claim by Enver Meštrovac (Meštrovac), who unsuccessfully challenged below a wage-rate calculation determination made pursuant to RCW 51.08.178. The superior court upheld the decision of the Board of Industrial Insurance Appeals (Board) regarding the wage-rate calculation, but concluded that both the Department of Labor & Industries (Department) and Board had improperly denied interpreter services to Meštrovac in conjunction with the processing and adjudication of his claim. The court remanded the case for proceedings before the Board to determine the amount the Board and Department owed Meštrovac for interpreter expenses. See Meštrovac, 142 Wn.App. at 702-03.

On appeal, Division I affirmed the superior court regarding the wage-rate calculation, but reversed the court with regard to Department and Board liability for failure to provide adequate interpreter services. See id. at 705-09. In particular, the Court of Appeals held that whether Ch. 2.43 RCW was violated at the Department level was not properly before the court for want of a written order, and that, although the Board had violated Ch. 2.43 RCW in failing to provide interpreter services for communications with legal counsel during the hearing, Meštrovac was not entitled to reimbursement for interpreter costs because no prejudice

compensation context. See Kustura v. Labor & Indus., 142 Wn.App. 655, 175 P.3d 1117 (2008), *review pending* (S.C. #81478-3); Ferenčak v. Labor & Indus., 142 Wn.App. 713, 175 P.3d 1109 (2008), *petition for review pending* (S.C. #81481-3). WSTLA Foundation appeared as amicus curiae in Kustura before Division I, see Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation (C.A. #57445-1-I), and is also filing an amicus curiae memorandum in Kustura in support of review in that case.

followed from this violation. See id. at 705-06, 707-09.² Unquestionably, the resolution of the issues surrounding Ch. 2.43 RCW in Meštrovac largely rested upon the Court of Appeals' opinion in Kustura v. Labor & Indus. See Meštrovac at 707-09 & accompanying notes; see also text supra at 1-2 n.1.

Meštrovac identifies a number of issues for review by this Court, and urges that the petition "raises issues of great import on how the Industrial Insurance Program should treat LEP injured workers." See Meštrovac Amended Pet. for Rev. at 1.³ The first issue raised in the petition is:

1. When the Department or Board provides incomplete interpreter services to an LEP worker during their proceedings, thus requiring him to pay his own interpreter, is this worker entitled to reimbursement for interpreter expenses?

See id. Meštrovac argues the Court of Appeals improperly denied reimbursement for his interpreter costs regarding communications with counsel at the Board hearing because he *was* prejudiced by the violation of RCW 2.43.030(1). See id. at 7-8. Elsewhere in the petition Meštrovac also challenges whether he was improperly denied interpreter services at the Department level. See id. at 5-6.

² The Court of Appeals also cross-referenced its opinion in Kustura v. Labor & Indus., and the holding in that case that Ch. 2.43 RCW only applies to Board hearings. See Meštrovac, 142 Wn.App. at 707.

³ This amicus curiae memorandum only addresses issues on review involving interpretation and application of Ch. 2.43 RCW.

III. ISSUES PRESENTED

1. If an LEP claimant is denied interpreter services before the Board of Industrial Insurance Appeals in violation of Ch. 2.43 RCW and incurs expenses in obtaining the necessary interpreter services, is the LEP claimant entitled to reimbursement for such expenses, irrespective of whether the underlying workers' compensation claim is successful?
(See Meštrovac Amended Pet. for Rev. at 1, issue #1)
2. If the answer to question #1 is that the LEP claimant is entitled to reimbursement under RCW 2.43.040, who is responsible for paying the cost of these interpreter services?
(See Meštrovac Amended Pet. for Rev. at 5-9)

IV. SUMMARY

Review in this case should be granted if the Court also grants review in Kustura v. Labor & Indus. because in resolving this case the Court of Appeals relied upon the interpretation and application of Ch. 2.43 RCW set forth in Kustura, and the meaning and intent of this statutory scheme is also implicated in some of the issues on review in this case. Moreover, review is specifically warranted in this case regarding whether this LEP claimant is entitled to reimbursement for interpreter costs incurred at the Board level when the claimant was denied interpreter services for communication with counsel in violation of Ch. 2.43 RCW. This issue is of substantial public interest, as is the related question whether, if reimbursement is required, the Department or Board is responsible for these costs under Ch. 2.43 RCW. See RAP 13.4(b)(4).

V. ARGUMENT IN SUPPORT OF REVIEW

Review should be granted in this case if it is granted in Kustura v. Labor & Indus. because the holdings in Kustura regarding interpretation and application of Ch. 2.43 RCW impacted the Court of Appeals' disposition here. See Meštrovac, 142 Wn.App. at 707-09 & accompanying notes; Kustura, 142 Wn.App. at 677-89. If the issues presented in Kustura involving interpretation and application of Ch. 2.43 RCW are of substantial public interest under RAP 13.4(b)(4), the same should be true for Ch. 2.43 RCW issues presented in this case.

Moreover, the issue of cost reimbursement for interpreter services Meštrovac incurred at the Board level for communications with counsel, resulting from violation of Ch. 2.43 RCW, should be reviewed by this Court as a matter of substantial public interest. See RAP 13.4(b)(4). In this case, the Court of Appeals states more explicitly than in Kustura that there is no basis for recovering these additional financial costs under Ch. 2.43 RCW when the interpreter services involved did not have an impact on the outcome of the underlying claim. Compare Meštrovac at 707-08 with Kustura at 680-82.

This aspect of the Court of Appeals' opinion is troublesome, and should be reviewed by the Court with the benefit of full briefing on the merits. If Meštrovac's statutory right to interpreter services for communication with counsel during the course of the Board hearing was violated, why should reimbursement for interpreter expenses incurred

abide the merits of the underlying claim? See Meštrovac Amended Pet. for Rev. at 7-8. Is this in keeping with the letter and spirit of RCW 2.43.010, and the Legislature's declared public policy of fully protecting LEP claimants in legal proceedings? The Court of Appeals' prevailing party-type analysis should be examined by this Court, as the highest policy making court of the State.

Should this Court accept review in order to determine whether reimbursement is required in furtherance of the remedial purposes of Ch. 2.43 RCW, then it may be necessary for it to reach the question whether such reimbursement would be made by the Department or Board. The Court of Appeals concluded that neither the Department nor Board were "the governmental body initiating the legal proceedings" under RCW 2.43.040(2). See Meštrovac at 709 n.21 (confirming Board is not governmental body initiating legal proceedings); Kustura, 142 Wn.App. at 680-81 (concluding Department does not initiate legal proceedings before the Board). Whether this analysis is correct is an issue of substantial public interest. See RAP 13.4(b)(4).

In ruling as it did below in Kustura that Department processing and adjudication of workers' compensation claims does not involve a "legal proceeding," and that the Department is not a governmental body initiating a legal proceeding for purposes of responsibility for cost of interpreter services, the Court of Appeals rejected well-defined arguments before it that the Department's administrative proceedings are indeed

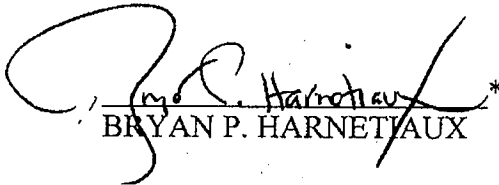
"legal proceedings" under Ch. 2.43 RCW, and that the Department is the initiating governmental body for purposes of payment of interpreter services. See WSTLA Fdn. Meštrovac Am. Br. at 6-13. Again, these pivotal legal questions will surface in this case if the Court accepts review and determines Meštrovac is entitled to reimbursement for the cost of interpreter services in communicating with counsel during the course of the Board hearing.

VI. CONCLUSION

This Court should grant review in this case.

DATED this 14th day of July, 2008.

Attach to
Email


BRYAN P. HARNETAUX *


MICHAEL J. PONTAROLO *

On Behalf of WSTLA Foundation

*Document to be transmitted for filing by e-mail; signed original retained by counsel.

APPENDIX

RCW 2.43.010

Legislative intent.

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

It is the intent of the legislature in the passage of this chapter to provide for the use and procedure for the appointment of such interpreters. Nothing in chapter 358, Laws of 1989 abridges the parties' rights or obligations under other statutes or court rules or other law.

[1989 c 358 § 1. Formerly RCW 2.42.200.]

RCW 2.43.020

Definitions.

As used in this chapter:

(1) "Non-English-speaking person" means any person involved in a legal proceeding who cannot readily speak or understand the English language, but does not include hearing-impaired persons who are covered under chapter 2.42 RCW.

(2) "Qualified interpreter" means a person who is able readily to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English.

(3) "Legal proceeding" means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.

(4) "Certified interpreter" means an interpreter who is certified by the administrative office of the courts.

(5) "Appointing authority" means the presiding officer or similar official of any court, department, board, commission, agency, licensing authority, or legislative body of the state or of any political subdivision thereof.

[2005 c 282 § 2; 1989 c 358 § 2. Formerly RCW 2.42.210.]

RCW 2.43.030

Appointment of interpreter.

(1) Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

(a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.

(b) Beginning on July 1, 1990, when a non-English-speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority. For purposes of chapter 358, Laws of 1989, "good cause" includes but is not limited to a determination that:

(i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of a certified interpreter are not reasonably available to the appointing authority; or

(ii) The current list of certified interpreters maintained by the administrative office of the courts does not include an interpreter certified in the language spoken by the non-English-speaking person.

(c) Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.

(2) If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

(a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and

(b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

[2005 c 282 § 3; 1990 c 183 § 1; 1989 c 358 § 3. Formerly RCW 2.42.220.]

RCW 2.43.040

Fees and expenses — Cost of providing interpreter.

(1) Interpreters appointed according to this chapter are entitled to a reasonable fee for their services and shall be reimbursed for actual expenses which are reasonable as provided in this section.

(2) In all legal proceedings in which the non-English-speaking person is a party, or is subpoenaed or summoned by the appointing authority or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings initiated by agencies of government, the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.

(3) In other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person

unless such person is indigent according to adopted standards of the body. In such a case the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted.

(4) The cost of providing the interpreter is a taxable cost of any proceeding in which costs ordinarily are taxed.

[1989 c 358 § 4. Formerly RCW 2.42.230.]

RCW 2.43.050

Oath.

Before beginning to interpret, every interpreter appointed under this chapter shall take an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.

[1989 c 358 § 5. Formerly RCW 2.42.240.]

RCW 2.43.060

Waiver of right to interpreter.

(1) The right to a qualified interpreter may not be waived except when:

- (a) A non-English-speaking person requests a waiver; and
- (b) The appointing authority determines on the record that the waiver has been made knowingly, voluntarily, and intelligently.

(2) Waiver of a qualified interpreter may be set aside and an interpreter appointed, in the discretion of the appointing authority, at any time during the proceedings.

[1989 c 358 § 6. Formerly RCW 2.42.250.]

RCW 2.43.070

Testing, certification of interpreters.

(1) Subject to the availability of funds, the administrative office of the courts shall establish and administer a comprehensive testing and certification program for language interpreters.

(2) The administrative office of the courts shall work cooperatively with community colleges and other private or public educational institutions, and with other public or private organizations to establish a certification preparation curriculum and suitable training programs to ensure the availability of certified interpreters. Training programs shall be made readily available in both eastern and western Washington locations.

(3) The administrative office of the courts shall establish and adopt standards of proficiency, written and oral, in English and the language to be interpreted.

(4) The administrative office of the courts shall conduct periodic examinations to ensure the availability of certified interpreters. Periodic examinations shall be made readily available in both eastern and western Washington locations.

(5) The administrative office of the courts shall compile, maintain, and disseminate a current list of interpreters certified by the office.

(6) The administrative office of the courts may charge reasonable fees for testing, training, and certification.

[2005 c 282 § 4; 1989 c 358 § 7. Formerly RCW 2.42.260.]

RCW 2.43.080

Code of ethics.

All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule.

[1989 c 358 § 8. Formerly RCW 2.42.270.]

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Subject: RE: Mestrovac v. Labor & Indus. (S.C. #81480-5)

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Dear Clerk:

Attached is the WSTLA Foundation amicus curiae memorandum for filing with the Court. A copy of it has been served on counsel of record by email, per prior arrangement.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169
On behalf of WSTLA Foundation

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